ISITO ELECTRONICS SDN BHD

v.

HO KEE TONG (OF MESSRS GAN, HO & RAZLAN HADRI)

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI MAKINUDIN J
[CIVIL APPEAL NO: R-17B-12-2003]
3 JUNE 2005

LEGAL PROFESSION: *Professional discipline - Misconduct - Appeal against decision of Disciplinary Board dismissing client's complaint against solicitor - Whether solicitor had acted dishonestly or unprofessionally - Whether Investigating Tribunal had erred in its finding - Whether appellate court ought to interfere with decision*

This was an appeal by the appellant against the whole decision of the Disciplinary Board ('the DB') – pursuant to s. 102(1)(a) and (3) of the Legal Profession Act 1976 – dismissing the appellant's complaint against the respondent, one Ho Kee Tong ('Ho') of Messrs Gan, Ho & Razlan Hadri (a firm of advocates and solicitors). The appellant was a client of the respondent, who, at all material times, represented the appellant as the plaintiff in a High Court action against one Plasmood Tool & Die Sdn Bhd ('the defendant'). A consent judgment was recorded between the appellant and the defendant for an agreed settlement sum of RM130,000, which became the subject matter of the complaint by the appellant against the respondent herein. Messrs Gan, Ho & Razlan Hadri, by way of a letter, enclosed a cheque for a sum of RM50,000 as part payment by the defendant, stating that the same was for the settlement sum of RM100,000. At that point in time, the appellant claimed that it was not disclosed to it that RM30,000 from the sum of RM130,000 was to be offset against the fee payable to the respondent.

There were essentially two main complaints contained in the appellant's letter to the DB. The first complaint was that the appellant was deceived by the respondent as follows: (i) the appellant had no knowledge that the consent judgment was for the sum of RM130,000; (ii) a copy of the draft consent judgment was not sent to the appellant at all material times despite repeated requests; (iii) the appellant had to conduct a file search at the High Court to extract a copy of the draft consent judgment; and (iv) the respondent retained the sum of RM30,000 until the appellant had extracted the copy of the draft consent judgment. The second complaint made against the respondent was premised on the ground that the respondent had rendered the appellant with

two bills for the total sum of RM47,172.70 for work done for the same subject matter for which the appellant had made payment earlier, which both parties had purportedly agreed to be the full and final settlement of legal fees for the case in the High Court. The DB constituted an Investigating Tribunal ('the IT') to investigate the complaints made by the appellant. The IT found in favour of the respondent resulting in the present appeal by the appellant.

Held (dismissing the appeal):

[1] With regard to the first complaint, the IT held that there was no deception on the part of the respondent and neither was there any intention to deceive the appellant as the draft consent judgment was faxed to the appellant, a fact which was admitted by the appellant. Given the appellant's admission before the IT, the first complaint made by the appellant was not only patently untrue but also contrived. It was highly unreasonable for the appellant to complain more than nine months later that the settlement sum was RM130,000 instead of RM100,000 when the appellant had in fact received a copy of the draft consent judgment. (p 580 f-h)

[2] As regards the second complaint, the IT made a finding that upon receiving the objection on the retention of RM30,000 as agreed fees, the respondent's solicitors returned the sum of RM30,000 forthwith and thereafter issued an invoice for services rendered. By reason of the said finding, the IT found that the respondent had acted in a professional manner and there was no dishonest act or fraudulent conduct on the issue of professional fees incurred. The IT had not erred in its finding; a solicitor was clearly entitled to issue an invoice for services rendered if the fee payable was disputed. There was clearly nothing unprofessional about that and it was clearly within the rights of the respondent to do so. In any event, the issue in respect of the disputed charges under the invoices issued by the respondent for professional fees was being ventilated by the parties in a civil suit filed at the Kuala Lumpur sessions court. Hence, this was clearly not an issue that concerned the IT. (p 581 a-d)

[3] For the reasons stated above and in the circumstances of this case, there was no reason to disturb the findings of the IT that were relied upon by the DB in its decision dismissing the appellant's complaint. (p 581 g)

Case(s) referred to:
Dr Chia Tiang Ping v. Chai Kai Wooi [1998] 1 LNS 99 ***(foll)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 ***(foll)***

Legislation referred to:
Legal Profession Act 1976, ss. 100, 102(1)(a), (3)

For the appellant/complainant - *Gregory Chan (Sunny Ang with him); M/s Gregory Chan, Tam, Moo & Ang*
For the respondent - *Ranjit Singh (Robert Low, CK Yeoh & Richard Yeoh with him); M/s Ranjit Ooi & Robert Low*
- *Razlan Hadri; M/s Gan, Ho & Razlan Hadri*

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin J:
This is an appeal by the appellant against the whole decision of the Disciplinary Board ("DB") pursuant to ss. 102(1)(a) and 102(3) of the Legal Profession Act 1976 ("the Act") in dismissing the complaint of the appellant *vide* Complaint No. DB/98/0350 against Mr. Ho Kee Tong of Messrs Gan, Ho & Razlan Hadri (a firm of advocates & solicitors).

Background Facts
The relevant background facts of the case leading to the complaint made by the appellant to the DB are as follows:

(1) The appellant company is a client of Mr. Ho Kee Tong, an Advocate & Solicitor practising under the name and style of Messrs Gan, Ho & Razlan Hadri.

(2) At all material times, Mr. Ho Kee Tong of Messrs Gan Ho & Razlan Hadri is the lawyer in charge of *inter alia*, the case of Kuala Lumpur High Court Suit No. S3-22-573-95 representing the appellant as plaintiff therein suing one Plasmold Tool & Die Sdn. Bhd. ("the said defendant") for a sum of RM1,123,500 together with interest at the rate of 8% per annum on the said sum from 9 February 1995 till date of full and final settlement and costs.

(3) Summary judgment was granted by the senior assistant registrar in favour of the appellant on 19 April 1996 and the said defendant appealed to the judge in chambers. The learned judge had on 9 October 1996 dismissed the said defendant's appeal with costs.

(4) The said defendant had by way of notice of appeal dated 28 October 1996 lodged an appeal to the Court of Appeal against the decision of the judge in chambers.

(5) Pending the fixing of a hearing date at the Court of Appeal, the appellant instructed the respondent as follows:

(a) to prepare a request for writ of seizure and sale against the said defendant which the appellant later instructed to withhold and was not filed at all;

(b) to prepare and file a winding-up petition against the said defendant and the first hearing date fixed for the winding-up petition was on 6 June 1997.

(6) On 7 January 1997 Messrs Gan, Ho & Razlan Hadri issued a Bill No. L5/(959) dated 9 January 1997 to the appellant for a sum of RM8,150 for work done in respect of resisting the said defendant's appeal to the judge in chambers.

(7) On 5 June 1997, the said defendant's application for a Court Order to stay execution proceedings in respect of the summary judgment came up for hearing and it was on 5 June 1997 that consent judgment was recorded between the appellant and the said defendant for an agreed settlement sum of RM 130,000 which now becomes the subject matter of complaint by the appellant against the respondent herein.

(8) Messrs Gan, Ho & Razlan Hadri by way of a letter dated 9 June 1997 enclosed a cheque for a sum of RM50,000 as part payment by the said defendant stating that the same was for the settlement sum of RM100,000. At that point in time the appellant claimed it was not disclosed to the appellant that RM30,000 from the sum of RM130,000 is to be offset against fee payable to the respondent.

The Appellant's Complaint

The appellant's complaint based on its letter dated 30 July 1998 addressed to the DB contained essentially two main complaints. The first complaint was that the appellant was deceived by the respondent as follows:

(1) The appellant has no knowledge that the consent judgment was for the sum of RM130,000.

(2) That the copy of the draft consent judgment was not sent to the appellant at all material times despite repeated requests.

(3) That a file search had to be conducted at the High Court of Kuala Lumpur by the appellant to extract a copy of the draft consent judgment.

(4) That the sum of RM30,000 was retained by the respondent until a copy of the draft consent judgment was extracted from the High Court by the appellant.

The second complaint made against the respondent is premised on the ground that the respondent had on 10 July 1998 rendered the appellant with two (2) bills for the total sum of RM47,172.70 for work done for the same subject matter for which the appellant has made payment earlier for the sum of RM8,500 which was purportedly agreed by both parties as full and final settlement of legal fees for the court case in Kuala Lumpur High Court Civil Suit No. S3-22-573-95.

Decision Of The Court

An Investigating Tribunal ("IT") was constituted by the DB under s. 100 of the Act to investigate the said complaints made by the appellant. At the hearing before the IT the appellant was represented by its director named Mr. Sia Ka Ho. With regard to the first complaint a finding of fact was clearly made by the IT wherein it stated as follows:

> When the Chairman of the Tribunal put the Complainant as to the date he received the Draft Order stating that the settlement amount was RM130,000.00, the Complainant admitted receiving the Draft Order on 7th July 1997. (See page 147 of The Appeal Record).

The IT went on to hold that there was no deception on the part of the respondent and neither was there any intention to deceive the appellant as the draft consent judgment was faxed to the appellant, a fact which was admitted by the appellant. The finding of the IT is supported by a facsimile transmission dated 7 July 1997 issued by the respondent to the complainant. Enclosed therein was the Draft Consent Judgment. (See pp. 257 to 262 of the Appeal Record).

It is our view given the appellant's admission before the IT, the first complaint made by the appellant is not only patently untrue but contrived. It is highly unreasonable for the appellant to complain more than nine months later that the settlement sum is RM130,000 instead of RM100,000 when the appellant had in fact received a copy of the draft consent judgment on 7 July 1997. The fact that the draft consent judgment was sent to the appellant is also consistent with the respondent's explanation in that the relationship between the appellant and the respondent was carried out in an informal manner. Many of the instructions were verbal including the telephone negotiation with regard to the settlement sum.

As regards the second complaint, the IT made a finding that upon receiving objection on the retention of RM30,000 as agreed fees, the respondent's solicitors returned the sum of RM30,000 forthwith and thereafter issued an invoice for services rendered. By reason of the said finding, the IT found that the respondent acted in a professional manner and there is no dishonest act or fraudulent conduct on the issue of professional fees incurred. The fact that the RM30,000 was refunded by the respondent immediately is not disputed as this fact is admitted by the appellant as evidenced by the letter dated 6 May 1998 from the respondent to the appellant.

It is our view that the IT did not err in its findng. A solicitor is clearly entitled to issue an invoice for services rendered if the fee payable is disputed. There is clearly nothing unprofessional about that and it is clearly within the rights of the respondent to do so. In any event, we noted that the issue in respect of the disputed charges under the invoices issued by the respondent for profesional fees is being ventilated by the parties in a Civil Suit filed at the Kuala Lumpur Sessions Court. Hence this is clearly not an issue which concerns the IT.

It is trite law that the Appellate Court will not interfere with the finding of facts of the trial judge or tribunal unless there was misdirection on the part of the trial judge or tribunal. (See the case of *Tan Sri Khoo Teck Puat & Anor. v. Plenitude Holdings Sdn. Bhd.* [1993] 1 MLJ 113). On this point it is pertinent to note that the same principle was also applied and adopted by another High Court sitting on an appeal pursuant to s. 103E of the Act in the case of *Dr. Chia Tiang Ping v. Chai Kai Wooi* [1998] 1 LNS 99 where his Lordship Azmel J in delivering the judgment of the panel emphatically stated as follows:

> We noted that all the allegations made by the appellant against the respondent were purely on questions of facts. The Investigating Tribunal had considered and dealt with at length on those facts. It is the cardinal principle practised by a Court that in exercising its appellate function it will not disturb the findings of facts of the subordinate Court or Tribunal unless the findings of those facts are totally absurd.

For the reasons above stated and in the circumstances of this case we were unable to find any reason to disturb the findings of the IT which were relied upon by the DB in its decision dismissing the complaint of the appellant. We therefore unanimously dismissed the appeal with costs.